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6 **UNITED STATES DISTRICT COURT**
7 **DISTRICT OF NEVADA**

8 JOHN TOLE MOXLEY,
9

10 *Petitioner,*

11 vs.

12 DWIGHT NEVEN, *et al.*,

13 *Respondents.*
14

2:07-cv-01123-RLH-GWF

ORDER

15 This represented habeas action under 28 U.S.C. § 2254 comes before the Court on
16 petitioner's motion (#54) for a stay and abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269,
17 125 S.Ct. 1528, 161 L.Ed.2d 440 (2005).

18 ***Background***

19 Petitioner John Tole Moxley seeks to set aside his 2004 Nevada state conviction,
20 pursuant to a jury verdict, of possession of a stolen vehicle and his adjudication as a habitual
21 criminal.

22 In Ground 2, petitioner alleges that he was denied a right to due process of law under
23 the Fifth and Fourteenth Amendments when the State allegedly breached a promise to accept
24 a plea to voluntary manslaughter in a murder case pending against him at the same time and
25 a plea to possession of a stolen vehicle in the present case after petitioner detrimentally relied
26 upon the promise by releasing his bail bond in the murder case. Petitioner alleges in
27 particular: (a) that a deputy district attorney "promised Moxley that he could plead guilty to
28 voluntary manslaughter in case C-14152 (1-10 year sentence stipulation) and to the

1 possession of the stolen vehicle charges in case C-189183, where he faced a 1-5 year
 2 sentence;” and (b) that “Moxley also believed that the deal included a provision that would
 3 preclude the District Attorney from pursuing habitual criminal enhancement against him in the
 4 PSV [possession of a stolen vehicle] case.” He seeks “in this PSV case, specific performance
 5 of the promises respecting the PSV plea, including the absence of any habitual criminal
 6 charges . . . , resulting in vacation of Moxley’s conviction and sentence.”¹

7 In its prior order, the Court held as follows:

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 9 In the state supreme court, petitioner neither alleged nor
 10 presented evidence that a plea deal had been reached in the
 11 stolen vehicle case when he stipulated to the exoneration of his
 12 bail bond. To now seek specific performance of a plea deal that
 13 he did not even allege existed at the time of his alleged
 14 detrimental reliance fundamentally alters the claim presented in
 15 state court. Petitioner alleged in state court that a question
 16 remained [at the time of the bond exoneration], as to whether to
 17 add the stolen vehicle case to the alleged agreement. The
 18 exhaustion doctrine does not permit him to now allege for the first
 19 time in federal court that he instead had an enforceable promise
 20 to include the stolen vehicle case that he detrimentally relied upon
 21 by stipulating to the exoneration of the bail bond. Such a claim
 22 clearly was not fairly presented to the state court.

23 Ground 2 therefore is not exhausted ***to the extent that:*** (a)
 24 petitioner claims that he detrimentally relied upon a promise by
 25 the State that he could plead guilty in the stolen vehicle case; (b)
 26 petitioner claims that he had a deal that precluded habitual
 27 criminal enhancement in the stolen vehicle case; and (c)
 28 petitioner seeks specific performance of an alleged promise or
 plea deal in the stolen vehicle case.

#53, at 6-7 (emphasis added).

The Court accordingly allowed petitioner an opportunity to seek dismissal of the entire
 petition, dismissal only of the unexhausted claims, and/or other appropriate relief.

In the present motion, the represented petitioner seeks a stay to exhaust “Ground Two”
 notwithstanding the fact that the Court did not hold that the entirety of Ground 2 was
 unexhausted. In the exhausted portions of Ground 2 that remain before the Court, petitioner
 alleges, *inter alia*, that he was prejudiced by the action in the murder case relating to bail

¹#33, at 11 & 13.

1 because he thereafter was unable to raise the bond premium required to be able to secure
2 his release on bail in order to prepare his defense in this case.

3 In the declaration (#56) filed after the motion, petitioner again proceeds on the premise
4 that the Court held that all of Ground 2 was unexhausted, which it clearly did not. Petitioner
5 seeks therein an order dismissing the entire amended petition without prejudice but without
6 entry of judgment during a stay and administrative closure. Such a procedure is not followed
7 on a *Rhines* stay. Such a dismissal likely would result in petitioner's remaining claims – all
8 of them, not merely the Ground 2 claims -- being time-barred when petitioner later sought to
9 reassert the claims. See, e.g., *King v. Ryan*, 564 F.3d 1133, 1139-43 (9th Cir. 2009).²

11 ***Discussion***

12 In order to obtain a *Rhines* stay to return to the state courts to exhaust a claim or
13 claims, a petitioner must demonstrate that there was good cause for the failure to exhaust the
14 claims, that the unexhausted claims include at least one claim that is not plainly meritless, and
15 that petitioner has not engaged in intentionally dilatory litigation tactics. See 544 U.S. at 278,
16 125 S.Ct. 1535.

17 ***Good Cause***

18 While the precise contours of what constitutes “good cause” in this context remain to
19 be fully developed in the jurisprudence, the Ninth Circuit has held that a requirement that the
20 petitioner show “extraordinary circumstances” to obtain a stay does not comport with the good
21 cause standard in *Rhines*. See *Jackson v. Roe*, 425 F.3d 654, 661-62 (9th Cir. 2005). The
22 Court concluded in *Riner v. Crawford*, 415 F.Supp.2d 1207 (D.Nev. 2006), following upon the
23 Ninth Circuit's holding in *Jackson*, that the good cause standard under *Rhines* therefore is not
24 so strict a standard as to require a showing of some extreme and unusual event beyond the
25 control of the petitioner to warrant a stay. 415 F.Supp.2d at 1210. On the other hand, *Rhines*

27 ²The declaration on petitioner's prior motion for a stay contained this very same deficiency, which the
28 Court expressly noted. See #47, at 5 n.7. Petitioner's counsel needs to read the orders of the Court, whether
#53 or #47.

1 instructs that a stay should be available only in “limited circumstances,” and the requirement
 2 of good cause therefore should not be interpreted in a manner that would render stay orders
 3 routine. *Wooten v. Kirkland*, 540 F.3d 1019, 1024 (9th Cir. 2008). Accordingly, a mere
 4 impression by a petitioner that a claim was exhausted is not sufficient to establish good cause
 5 for a failure to exhaust, given that, if it were, “virtually every habeas petitioner, at least those
 6 represented by counsel, could argue that he *thought* his counsel had raised an unexhausted
 7 claim and secure a stay.” *Id.* (emphasis in original).³

8 In the present case, petitioner seeks to demonstrate good cause based upon (a) his
 9 *pro se* status in the state courts and the state courts’ failure to appoint counsel on his
 10 collateral state challenges to his conviction; and (b) the fact that he currently has a state post-
 11 conviction petition pending challenging his murder conviction in which he allegedly could
 12 pursue “the Ground Two claim.”

13 As to *pro se* status, petitioner raised the same argument, based on the same authority,
 14 in a prior motion for a stay as to other unexhausted claims.⁴ The Court rejected the argument:

15 Petitioner’s *pro se* status, standing alone, cannot
 16 demonstrate good cause. Basing a finding of good cause upon
 17 *pro se* status “would render stay-and-abey orders routine” and
 18 thus “run afoul of *Rhines* and its instruction that district courts
 19 should only stay mixed petitions in ‘limited circumstances.’” *Cf.*
Wooten, 540 F.3d at 1024. A petitioner must do more than point
 to a failure to appoint counsel in the state post-conviction
 proceedings, where counsel is not required under the Sixth
 Amendment, to establish good cause under *Rhines*.

20 #47, at 4 (footnote omitted).

21 The argument has not become more persuasive. None of the cases cited by petitioner
 22 involved a *Rhines* stay, and the cases therefore are wholly inapposite.

23
 24 ³In *Riner*, the Court’s order was issued following a remand from the Ninth Circuit for reconsideration
 25 of its dismissal order in light of the intervening authority in *Rhines*. The Court did not hold that Riner either
 26 had or had not demonstrated good cause. The order instead gave Riner an opportunity to demonstrate good
 27 cause and the other requirements for a *Rhines* stay. Riner thereafter did not seek such a stay but instead
 sought reconsideration of the Court’s prior holding that the claims in question were unexhausted. See, e.g.,
 No. 3:99-cv-0258-ECR-RAM, #72. The published *Riner* decision therefore did not make a definitive holding
 as to good cause applicable to a then-attempted specific factual demonstration of good cause.

28 ⁴Compare #43, at 4-5 with #54, at 6-7.

1 Petitioner urges, however, that the factor of his *pro se* status is not “standing alone”
 2 on the present motion due to the existence of the pending state post-conviction petition on
 3 the murder case. He asserts that “the Ground 2 claim” is or will be pending in the state
 4 petition. He maintains that the pendency of the state petition, as to which counsel has been
 5 appointed, presents “‘good cause’ for issuance of a stay under Rhines.” #54, at 6-7.⁵

6 Petitioner must not demonstrate good cause “for issuance of a stay under Rhines” in
 7 some amorphous sense. He instead must demonstrate good cause “for the petitioner’s failure
 8 to exhaust his claims first in state court.” *Rhines*, 544 U.S. at 277, 125 S.Ct. at 1535. The
 9 mere fact that petitioner has a state petition challenging an entirely different judgment of
 10 conviction based upon a similar issue does not demonstrate good cause for petitioner’s failure
 11 to exhaust the unexhausted portions of Ground 2 previously. He simply failed to exhaust the
 12 claim previously. He advances no good cause for having failed to do so.

13 Moreover, petitioner’s assumption that the state court will be resolving “the Ground 2
 14 claim” presented in *this* case on the pending state petition is an extremely dubious one.
 15 Petitioner must exhaust the unexhausted claims in Ground 2 *as an attack on the stolen-*
 16 *vehicle judgment of conviction*. Any adjudication of a post-conviction ground seeking to set
 17 aside the *murder* conviction will not exhaust the unexhausted challenges in Ground 2 to the
 18 *stolen-vehicle* conviction.⁶ Petitioner conflates issues with claims. Merely because a state
 19 court is considering a similar issue in a petition challenging an entirely different judgment of
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21 ⁵Petitioner further urges that he needed a trial transcript from the public defender. See #54, at 6. Yet
 22 Moxley represented himself during the proceedings involving the plea discussions and his exoneration of the
 23 bail bond. If he wished to assert a claim that he personally detrimentally relied upon a promise that included
 24 a plea as to the stolen-vehicle case, he did not need the *trial* transcript to allege such a claim. Indeed, the
 25 request for counsel from which federal habeas counsel cites, referring to a need for the trial transcript, was
 26 filed one year *after* his mandamus petition. Compare #37, Ex. 75 (August 26, 2004, mandamus petition) with
 27 #35, Ex. 44 (September 7, 2005, motion). Moreover, his mandamus petition hardly was bereft of detail. See
 28 #37, Ex. 75. As the Court noted in its prior order, the state court record exhibits filed on federal review were
 presented in no discernible order. See #53, at 7. Federal habeas counsel’s corresponding reliance upon
 state court filings without regard to when they were filed or in what context is wholly unpersuasive.

⁶Moxley’s reliance upon tolling cases under 28 U.S.C. § 2244(d)(2) concerning challenges to prior
 judgments used to enhance a sentence is unpersuasive. The issue here is exhaustion not tolling, and a prior
 conviction used for enhancement is not involved. A state petition seeking to set aside a murder conviction
 does not exhaust a claim seeking to set aside a stolen-vehicle conviction under a separate judgment.

1 conviction has nothing to do with the exhaustion of unexhausted claims in this matter seeking
2 to set aside the stolen-vehicle conviction.

3 In all events, even if petitioner had filed another state petition actually challenging the
4 stolen-vehicle conviction based on the unexhausted claims in Ground 2, that filing would not
5 have demonstrated good cause for his failure to exhaust the claims previously, whether
6 standing alone or in combination with his prior *pro se* status. To obtain a federal stay under
7 *Rhines*, petitioner must demonstrate good cause for his failure to exhaust the claims
8 previously, not merely that he already has filed additional state proceedings. Petitioner at
9 bottom has the cart before the horse, seeking to bootstrap a showing of good cause based
10 upon the pendency of other state proceedings. He instead first must demonstrate – at least
11 when a stay is sought pursuant to *Rhines* -- good cause to obtain a stay of the federal
12 proceedings for the purpose of pursuing other state proceedings.⁷

13 ***Remaining Issues***

14 Given that plaintiff has failed to show good cause for his failure to exhaust the
15 unexhausted claims previously, the Court has no occasion to consider the remaining
16 *Rhines* factors.

17 The request for a stay -- which has been made exclusively under *Rhines* rather than
18 under any other available alternative⁸ -- therefore will be denied.

19 Petitioner requests that, if the Court denies the present motion, the Court allow him
20 another opportunity to make an election as to the unexhausted claims. The Court recently
21 acknowledged that it would have to proceed in this manner if the motion were denied. #58,

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23 ⁷The mere fact that the state court has appointed counsel on the state petition challenging the murder
24 conviction does not signify anything as to the potential merit of a specific claim therein. The petition in that
25 case contains 27 grounds and is 92 pages long. See #54, Exhibit A. Courts appoint post-conviction counsel
26 for any number of reasons. Such an appointment does not signify, in and of itself, that a particular claim
27 necessarily has potential merit. Nothing in this Court's own review of the unexhausted claims reflects that the
28 claims are of potential probable merit. See, e.g., *Mabry v. Johnson*, 467 U.S. 504, 104 S.Ct. 2543, 81 L.Ed.2d
437 (1984)(a defendant's acceptance of a plea agreement that has not yet been accepted by the trial court
does not create a constitutional right to have the bargain specifically enforced, with the Supreme Court not
following the detrimental reliance analysis that the district court instead applied).

⁸*Cf. King, supra* (discussing alternatives).

1 at 2. However, the Court also previously has expressed its strong disfavor of petitioner's
 2 piecemeal election of remedies in this regard, particularly in this older case. See #47, at 4.
 3 The Court further has been – abundantly – clear as to the need to move this nearly four-year
 4 old case to a prompt resolution.

5 Petitioner will be given one – and one only – additional opportunity to make an election
 6 as to the relief to be requested as to the unexhausted claims. If petitioner makes a request
 7 or requests for relief without presenting a viable alternative request for relief, and the request
 8 or requests presented are denied, the Court then will proceed with the default rule under the
 9 controlling law – dismissal of the mixed petition. This proviso applies fully to any request for
 10 relief packaged together with another request.⁹ If the Court denies the packaged requests
 11 as presented, it then will proceed to either the next discrete alternative requested or, in the
 12 absence of same, to dismissal of the entire petition. In other words, if petitioner still wishes
 13 for the Court to consider a request included within packaged requests standing alone if the
 14 requests are denied as packaged, petitioner needs to request this explicitly.

15 Further, if petitioner again presents a declaration by petitioner that contemplates a
 16 different procedure than the procedure or procedures requested in the motion, the Court then
 17 will proceed with the default rule under the controlling law – dismissal of the mixed petition.

18 The Court will not repeat these admonitions again prior to entry of a final judgment of
 19 dismissal.¹⁰

20 IT THEREFORE IS ORDERED that the motion (#54) for a stay is DENIED.

21 IT FURTHER IS ORDERED that petitioner shall have **fourteen (14) days** from the date
 22 of entry of this order to file a motion either for dismissal without prejudice of the entire petition,
 23 for partial dismissal only of the unexhausted claims, and/or for other appropriate relief. The

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 25 ⁹Petitioner in particular should not assume that a request for relief packaged with a request for an
 26 anticipatory ruling on another issue – such as tolling, relation back, exhaustion, and/or procedural default –
 necessarily will be granted.

27 ¹⁰Petitioner does not have a constitutional right to counsel in this proceeding. Accordingly, petitioner
 28 bears the risk in federal habeas for all attorney errors made in the course of the representation. *Cf. Coleman*
v. Thompson, 501 U.S. 722, 754, 111 S.Ct. 2546, 2567, 115 L.Ed.2d 640 (1991).

1 motion must be accompanied, **by the same deadline**, by a signed declaration by petitioner
2 under penalty of perjury pursuant to 28 U.S.C. § 1746 that he has conferred with his counsel
3 in this matter regarding his options, that he has read the motion, and that he has authorized
4 that the relief sought therein be requested from the Court. The entire petition will be
5 dismissed without prejudice for lack of complete exhaustion without further advance notice
6 if petitioner does not contemporaneously file **both** a timely motion **and** a declaration.

7 IT FURTHER IS ORDERED that the Court will not entertain any more serial, piecemeal
8 requests for relief with regard to the unexhausted claims. In the motion filed in response to
9 this order, petitioner must present all alternative requests for relief sought in the event that the
10 Court denies the relief requested. **If the Court is not presented with a viable alternative**
11 **request for relief and it denies the request(s) made, the Court then simply will dismiss**
12 **the entire petition as a mixed petition without further advance notice. Further, if**
13 **petitioner again presents a declaration by petitioner that contemplates a different**
14 **procedure than the procedure or procedures requested in the motion, the Court then**
15 **simply will dismiss the entire petition as a mixed petition without further advance**
16 **notice.**

17 IT FURTHER IS ORDERED that respondents may file a response to any such motion
18 within **seven (7) calendar days** of the **filing** date of the motion.

19 IT FURTHER IS ORDERED that petitioner may file a reply within **seven (7) calendar**
20 **days** of the **filing** date of the response.

21 **Requests for extension of time will not be entertained absent the most**
22 **compelling of circumstances. The other provisos in the Court's prior order (#58) as to**
23 **requests for extension of time continue to govern these proceedings.**

24 DATED: August 15, 2011.

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26 
27 ROGER L. HUNT
28 United States District Judge